Cases—Continued. Page

National Harrow Co. v. *Hench*, 83 Fed. 36 68
National Harrow Co. v. *Hench*, 84 Fed. 226 68
Northern Securities Co. v. *United States*, 193 U. S. 197 45
Stafford v. *Wallace*, 258 U. S. 495 58
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20 .. 18, 43, 44, 66
Straus v. *Victor Talking Machine Co.*, 243 U. S. 490 13
Terminal Railroad Association v. *United States*, 266 U. S. 17 .. 2
United Mine Workers v. *Coronado Coal Company*, 259 U. S. 344 53
United States v. *General Electric Co.*, 272 U. S. 476 44
United States v. *Motion Picture Patents Co.*, 225 Fed. 800 .. 69
United States v. *New Departure Mfg. Co.*, 204 Fed. 107 69
United States v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172 .. 67
United States v. *Trenton Potteries Co.*, 273 U. S. 392 46

Statute:

Act of July 2, 1890, c. 647, 26 Stat. 209—
Sec. 1 (U. S. C., Title 15, sec. 1) 2
Sec. 2 (U. S. C., Title 15, sec. 2) 3
Sec. 4 (U. S. C., Title 15, sec. 4) 3

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 378

STANDARD OIL COMPANY (INDIANA), STANDARD OIL Company (New Jersey), Standard Development Company, et al., appellants

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the specially constituted United States District Court for the Northern District of Illinois (R. 1988) is reported in 33 F. (2d) 617.

JURISDICTION

The decree of the District Court was entered on January 20, 1930. (R. 2020.) Petitions for ap-

peal were filed March 10, 1930 (R. 2020–2025), and were allowed the same day (R. 2092).

Jurisdiction of the Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). *Terminal Railroad Association* v. *United States*, 266 U. S. 17.

QUESTIONS PRESENTED

(1) Whether the agreements between the primary defendants, apart from the question of alleged justification under their patents, constitute a combination in unlawful restraint of interstate commerce.

(2) Whether, if so, the restraints imposed by these agreements are wholly within the scope of the patent rights of the primary defendants.

(3) Whether the decree of the District Court correctly declared void, rather than voidable, certain agreements between primary defendants and secondary defendants.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Secs. 1, 2, and 4), known as the Sherman Antitrust Act, provides in part as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise pro-

hibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

THE PROCEEDINGS PRIOR TO THE MASTER'S REPORT

This is a suit in equity instituted in June, 1924, to prevent the defendants from further engaging in a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Antitrust Act. (R. 1, 6.)

The petition alleges that for more than half a century gasoline has been manufactured from crude oil by distillation and condensation at atmospheric pressure, known as the skimming process; that the cracking process consists of manufacturing gasoline by subjecting certain heavy distillates, produced as by-products of the skimming process, to high temperatures under superatmospheric pressures; that gasoline so produced, called "cracked gasoline" is indistinguishable from first run gasoline; that no basic patent covers present day cracking processes; that numerous United States patents have been issued covering minor improvements in processes and apparatus for the manufacture of cracked gasoline; that these pat-

ents are to a large extent owned by the "primary defendants" to this suit, who have used the patent claims as a device to lend color of legality to their conspiracy. (R. 7–9.)

The defendants, Standard Oil Company, incorporated in Indiana (herein called Indiana); the Texas Company (herein called Texas); Gasoline Products Company (herein called Gasoline Products); Standard Oil Company, incorporated in New Jersey, and its 100 per cent subsidiary, Standard Oil Development Company (herein collectively called New Jersey), are classified in the petition and will be referred to herein as the primary defendants. (R. 9.) All the other defendants, consisting of forty-five corporations and one individual, are classified and will be referred to herein as secondary defendants. (R. 2–6, 9.) The petition alleges that each secondary defendant is a party to a patent licensing agreement or agreements with one or more of the primary defendants; that the secondary defendants could not obtain licenses under any of the alleged patent rights controlled by the primary defendants without agreeing to the terms imposed by the latter; and that the secondary defendants thereby became parties to, although not promoters of, the unlawful conspiracy. (R. 10.)

The petition charges that the primary defendants, seeking to restrain and monopolize interstate and foreign commerce in gasoline and other

petroleum products, and to realize huge profits by extorting from all manufacturers of cracked gasoline large sums in the guise of royalties and to impose on such manufacturers onerous and oppressive conditions designed to insure to said defendants a monopolistic control of such commerce, had made a series of agreements between themselves whereby they cross-licensed each other under their respective patents and effectively pooled their patents; made provision for extending the combination and monopoly beyond the life of any patents then owned; presented a solid front against, and provided for the payment of heavy royalties by, those who desired to produce gasoline by a cracking process, which royalties burdened and restrained interstate and foreign commerce in cracked gasoline by increasing its price; and included in their agreements covenants and conditions which directly impeded and restrained interstate commerce in cracked gasoline by securing for Indiana a virtual monopoly of such commerce in particular territories. (R. 10–11.) Seventy-nine agreements, dated from January 30, 1914, to October 5, 1923, are listed as constituting and evidencing the unlawful conspiracy. (R. 12–20.) Fifteen of these 79 agreements were between two or more primary defendants; the others were between a primary defendant and a secondary defendant. (R. 21, 24.) The petition describes in detail some of the restrictive provisions and effects of these 79

agreements and particularly those numbered 31, 55, and 74, which appear in the record as Exhibits 31, 55, and 74, respectively. (R. 21–39.)

The prayer of the petition is, among other things, that the defendants be enjoined from further carrying out the combinations in restraint of trade previously described and from enforcing any of the provisions of the agreements described in the petition the purpose or effect of which is to restrain or monopolize interstate or foreign commerce in gasoline. (R. 41–42.)

The primary defendants and a majority of the secondary defendants answered denying any conspiracy. (R. 44–399.)

A supplemental petition filed by the United States made Joseph H. Adams and M. W. Kellogg Company parties defendant. (R. 1988.) This petition alleged that certain patents issued to Adams and assigned to Texas had been procured by fraud, and that the Kellogg Company conspired with the primary defendants to injure a competitor engaged in selling licenses under his cracking process patents. (R. 1999.) The United States did not appeal from the decree of the District Court dismissing the petition and supplemental petition as to these two defendants. (R. 2020.)

The United States filed an expediting certificate under the Act of June 25, 1910, 36 Stat. 854, calling for a statutory three-judge court. (R. 400.) This court, consisting of Circuit Judges Evans, Page, and

Anderson, appointed a Master to take testimony and report his conclusions of fact and law. (R. 402–403.) The court entered an order allowing the United States to file interrogatories requiring each primary defendant and Standard Oil Company of New York to answer which of the 72 patents licensed in one or more of the 79 agreements described in the petition were used in the operation of its cracking process. (R. 404–406.) The court also allowed the United States to introduce evidence of disclosures in the prior art for the purpose of interpreting and delimiting the scope and application of patents of the primary defendants and for the purpose of showing lack of invention. (R. 408–424.)

The United States introduced in evidence the 79 contracts listed in the petition (Exhibits 1 to 79), the answers to its interrogatories (R. 2115–2214), extensive documentary and oral patent evidence, the answers (Exhibits 82–85) of the primary defendants to a questionnaire submitted to them by the United States and statements (Exhibits 86–89) compiled from these answers showing the royalties for the use of cracking processes paid to the primary defendants and the distribution of such royalties among them pursuant to their cross-licensing agreements. Among the witnesses called by the United States were representatives of four secondary defendants (R. 805, 807, 816, 823) and an officer of a company licensed in 1925 under the Cross process of Gasoline Products (R. 821–823).

Upon the technical patent questions the defendants relied almost entirely on the testimony given and the documentary evidence introduced by the assistant director of research of Indiana. (R. 2966–3656, 3677–3685.) The defendants also called as witnesses the president of Gasoline Products (R. 833), the president and the patent attorney of Texas (R. 866, 916), the president, the treasurer and the manager of development of New Jersey (R. 932, 951, 958), the chairman of the board of directors of Indiana (R. 990) and a director of the Richard Fleming Company (R. 864).

Before considering defendants' 79 licensing or cross-licensing agreements, the Government calls attention to two circumstances disclosed by the evidence which have an important bearing on the purpose and effect of these agreements—the large royalties which the primary defendants received and their substantial monopoly of cracked gasoline production.

Indiana's net royalty receipts from its licensing and cross-licensing agreements were over $23,850,000 for the years 1914 to 1924, inclusive, and over $8,950,000 for the years 1921 to 1924, inclusive. (R. 789.) For the latter years the royalties paid by secondary defendants to primary defendants amounted to approximately $11,000,000. (R. 799.)

Exhibit A, printed in the appendix to this brief, *infra*, pp. 76–80, shows that on the basis of the defendants' figures the primary defendants and their subsidiaries produced in 1921 over 72%, in 1922

over 73%, in 1923 over 78%, and in 1924 over 81% of the total United States production of cracked gasoline for these respective years. On the same basis the 1921 production of the primary defendants, their subsidiaries and licensees, has been computed in the same exhibit to be about 86%, and their 1924 production over 93% of the total United States production of cracked gasoline in these respective years. (*Infra*, p. 80.) Their actual percentage of the 1924 production was undoubtedly higher than is there indicated since the 1924 production of New Jersey's licensees was not included in the computation.[1]

INDIANA'S EARLY AGREEMENTS

With the development of the automobile, gasoline supplanted kerosene as the most valuable product of crude oil (R. 874–876, 1007), and there has accordingly been a continuous endeavor to discover profitable methods and apparatus for increasing the yield of gasoline.

After a number of years of research and experimental work, Indiana developed a process for cracking gasoline, known as the Burton process, which it put into use on a commercial scale in its

[1] The percentages in Exhibit A correspond with the figures in the opinion of the District Court (R. 2004) on the percentage of cracked gasoline production of the primary defendants and their licensees. A note on pages 44 and 45 of the main brief for the primary defendants, which will hereinafter be referred to as defendants' brief, states that no support in the record is found for the figures quoted by the District Court. Exhibit A shows these figures to be amply supported by the record.

own refineries in the years 1912, 1913, and 1914. (R. 64.) The process is described in the Master's report. (R. 465–472.) The first Burton patent relating to a cracking process or apparatus was issued January 7, 1913, and Indiana obtained other such patents issued from time to time during the years 1913 to 1923. (R. 440–442.) Until 1921, Indiana had a practical monopoly of making gasoline by cracking; as admitted in defendant's brief (p. 7), the Burton process was "the sole process in practical use for about seven years after its introduction."

From January, 1914, to July, 1921, prior to its first cross-licensing agreement, Indiana issued 23 licenses to 15[2] different companies under its United States patents relating to processes and apparatus for cracking gasoline. (Exhibits 1 to 30, except 1, 4, 15, 21, 23, 24, 25.) It also issued one license under, and made four assignments of, similar foreign patents. (Exhibits 1, 4, 15, 21, 24.) The Government did not attack these agreements as wholly illegal; it attacked certain of their provisions as tending to restrain interstate and foreign commerce. Although Indiana after the argument before the District Court waived these provisions (R. 736–757), they are referred to because of their bearing on certain later contracts.

---

[2] Defendants' brief (p. 8) states that Indiana so licensed 16 refiners. Defendants probably failed to note that the Petroleum Refining Company changed its name to the Galena Signal Oil Company. (R. 14, 1298.)

Indiana was engaged in retail marketing in the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Wisconsin, and Wyoming. (R. 66; defendants' brief, p. 8.) These States, with Montana, to which it shipped for distribution large quantities of petroleum products (R. 66–67), will be called for convenience Indiana territory. Twenty-six of the 28 licensing agreements made by Indiana prior to August, 1921, including the assignments of foreign patents, contained provisions designed to restrict the movement of cracked gasoline in interstate or foreign commerce in Indiana territory. Fourteen agreements (Exhibits 7, 10, 11, 12, 13, 14, 16, 17, 18, 22, 27, 28, 29, 30) gave Indiana an option to cancel the license if the licensee, "or others with the consent, approval, or knowledge of the licensee," sold the gasoline manufactured thereunder in Indiana territory (R. 26). Three others (Exhibits 8, 19, 20) contained substantially the same provision. (R. 26.) In five additional agreements (Exhibits 2, 3, 5, 6, 9) the license to sell gasoline manufactured thereunder expressly excepted Indiana territory, and Indiana could terminate the agreement if the licensee failed to comply with any of its terms. (R. 26–28, 1036, 1044, 1061, 1069, 1099.) In four other agreements (Exhibits 4, 21, 24, and 15, supplemental to 4) assigning foreign patents the assignee agreed not to sell or "permit to be sold" gasoline manufactured thereunder in Indiana territory. (R. 27–29.)

All of Indiana's patents, except one relating to twine oil which is irrelevant in the present connection, are process or apparatus patents. (R. 440–441, 475.) Such patents confer the exclusive right to make, use and vend only the patented process or apparatus. The unpatented product of the patented process or machine is entirely outside the protection of the patent grant. Consequently the various restrictive provisions in Indiana's early licenses, relating to the sale of gasoline, were entirely outside the scope of Indiana's patent monopoly and were unreasonable restraints of interstate commerce. *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502.

Of all the business in petroleum products in Indiana's retail marketing territory, Indiana in 1913 did over 80% and in 1924 45%. (R. 67, 993.) Since the decrease in its percentage of the total business was gradual, a drop of about 3% a year is indicated. (R. 993.) During the period from January, 1914, to August, 1921, its percentage of the business in Indiana territory therefore ranged from about 80% in 1914 to about 55% in July, 1921. The record does not show whether this dominance of its retail marketing territory bore any relation to Indiana's extraordinary earnings but it does show that for the years 1914 to 1925, inclusive, its invested capital increased about $370,000,000 and that the chairman of its board of directors thought that this represented "entirely

retention of earnings." (R. 1025.) The record does not disclose what cash dividends it paid during these years.

AGREEMENT NO. 31

Texas, which is described in defendants' brief (p. 10) as "a very large producer, one of Indiana's principal competitors," and which was not a licensee of the Burton process, developed after several years of research and experimental work a process for cracking gasoline which is known as the Holmes-Manley process.[1] This process is described in the Master's report. (R. 500–503.) During the years 1920 to 1924, inclusive, Texas, using this process, practically doubled each year its cracked gasoline production. (R. 774.) In 1920 its cracked gasoline production was about 21,000,000 gallons; in 1924 it was over 316,500,000 gallons. (R. 774.) The Master found that the Holmes-Manley process could handle seven times as much charging stock per day as the Burton process and that it would produce a greater percentage of gasoline. (R. 610.) From the outset Texas was, therefore, a serious potential competitor of Indiana both as a licensor of a cracking process and as a retailer in Indiana territory of gasoline made by cracking.

[1] Defendants' brief (p. 11) indicates that the installation of Holmes-Manley units was expected to cost Texas about $17,000,000. The testimony was that up to January 1, 1926, Texas had spent $14,000,000 in installing various Holmes-Manley units. (R. 897.)

In 1920 when the parties began negotiating Agreement No. 31 Indiana was deriving an enormous income from its cracking patents. Its royalties from this source in 1919 were over $3,850,000 and for the three years 1918, 1919, and 1920 averaged over $3,482,000. (R. 785–786.) If Texas with a probably superior process had competed freely with Indiana in the business of licensing, it might have established lower royalty rates than those of Indiana and have captured most of the business of new licensing. In addition, Indiana's existing licensees, which were paying it nearly $3,500,000 a year, might for similar reasons have taken out licenses under the Holmes-Manley process, a result which would have gradually cut off Indiana's large royalty income.[4]

Indiana had another reason to fear the competition of Texas. More than half the business in petroleum products in Indiana territory was done by Indiana and it had in its licensing agreements a weapon with which to keep out of this territory gasoline made with the economies incident to cracking. The president of Texas testified that in 1920 Texas intended to equip all its refineries with Holmes-Manley units and at that time two of its six refineries were in Indiana territory. (R. 867, 897.) Texas might also have granted licenses to other companies operating in that territory.

---

[4] That this was not improbable is shown by the fact that Indiana itself subsequently installed Holmes-Manley units. (R. 1018.)

Under these circumstances the two companies on August 26, 1921, entered into Agreement No. 31. (R. 1315.) By this agreement all royalties, damages, or settlements paid to either party for the use of Indiana or Texas patent rights were to be equally divided, except that the income so derived from the existing licensees of Indiana was to go three-fourths to Indiana and one-fourth to Texas for the period from January 1, 1921, to January 1, 1937, and thereafter was to be equally divided. (R. 1316, 1319.) The term "patent rights" was defined to include all United States patents relating to processes and apparatus for the manufacture of gasoline by cracking under pressure acquired by either party at any time prior to January 1, 1937. (R. 1316.) Each licensed the other under its patent rights, each could grant licenses under the patent rights of the other and Indiana could offer its existing licensees a license under the patent rights of Texas. (R. 1317–1318.) Each waived any claim for past infringement and Texas agreed not to sue, without Indiana's consent, any existing licensee of Indiana for past infringement of the patents of Texas as long as the licensee paid the royalties due under its agreement with Indiana. (R. 1320.) Since all royalties from future licensees were to be divided equally, neither party had any incentive to license under its own patents alone.

A license under the patents of both parties could be issued only on terms and conditions mutually

agreed upon. (R. 1318.) There were accordingly attached to the agreement forms of license to be issued respectively to licensees within and to licensees outside of Indiana territory, which were accepted as satisfactory for this purpose. (R. 1318, 1324.) These license forms fixed the royalty to be charged at 4¢ per gallon of charging stock, which was equivalent to the royalty being paid by all of Indiana's United States licensees. (R. 1327, 1334.) These license forms further provided, among other things, that if the licensee is outside Indiana territory, Indiana may purchase at wholesale prices during the life of the agreement one-third of the licensee's production of gasoline manufactured thereunder "sold or shipped" into Indiana territory and, if the licensee is in Indiana territory, Indiana may purchase at wholesale prices during the life of the agreement one-third of the licensee's entire production of gasoline manufactured thereunder. (R. 1324–1325, 1332.)

The same purpose and effect to restrict the free movement in Indiana territory of gasoline made by cracking and to protect Indiana against the competition of such gasoline is disclosed by Section 13 of Agreement No. 31. This provides that if at any time prior to January 1, 1937, gasoline "manufactured by it [Texas] by pressure cracking" within Indiana territory exceeds 25% of the gasoline so manufactured by Indiana in that ter-

ritory, Indiana may purchase one-third of such excess. (R. 1320–1321.) The covenant thus applies broadly to all gasoline made by cracking, irrespective of the process used or the patents employed, and it therefore extends beyond any Indiana patent monopoly, and the District Court so found. (R. 2014.) While an option to purchase from a competitor at market prices might not under some circumstances be unreasonable, there would seem little doubt that this option running 15½ years into the future, when it was one of a series of agreements over a period of many years designed to protect Indiana against the competition of cracked gasoline in its retail marketing territory, is an agreement in unreasonable restraint of interstate commerce ~~is~~ violative of the Sherman Act.

Defendants contend that the only motive of Indiana and Texas in making Agreement No. 31 was to free themselves from patent litigation. The agreement went beyond a reasonable adjustment of actual or potential patent conflicts, fixed royalty rates, and suppressed competition in the sale of gasoline and in the business of granting licenses to use two commercially successful and highly competitive processes for the manufacture of gasoline. If such an agreement is in restraint of interstate commerce in cracked gasoline, the good intention of the parties does not render it lawful. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49.

But the evidence that the primary purpose of the parties was an adjustment of patent difficulties does not seem plausible. The so-called notice of infringement which Texas sent Indiana in July, 1920, was a friendly invitation to negotiate; Indiana did not make any written counter charge of infringement against Texas. (R. 919–920, 929.) Prior to any litigation and without any adverse report on its patent situation Indiana made an agreement which might require it to pay Texas $14,000,000.[*] Indiana's patent attorneys had advised merely that whether either company's process infringed the other's patents might be decided by the courts either way. (R. 1017.) The Texas executives obtained no written report from its patent attorney on the question of infringement. (R. 920, 929.) Texas had had sufficient confidence in its patent situation to spend $3,000,000 by the beginning of 1920 in installing Holmes-Manley units (R. 897) although the 5 patents which Indiana charged Texas with infringing were all issued prior to 1917 (R. 440–441, 920). The agreement went far beyond an exchange of immunities. It continued by agreement between competitors the restraints on commerce which Indiana had imposed to protect itself from the competition of cracked gasoline in its retail marketing territory and extended these restraints to licensees under patents

[*] Indiana's royalty income had averaged over $3,482,000 during the last three years (*supra*, p. 15) and ¼ of this amount for sixteen years is $13,928,000.

owned by Texas. This suggests that other motives than a mere settlement of patent conflicts actuated the parties.

The District Court specifically found that the Holmes-Manley process did not infringe the "so-called Burton patents of the Standard Oil of Indiana" and the context indicates that the entire group of Indiana patents was referred to. (R. 2004–2005.) Whether or not the Master made any finding that the Burton or Holmes-Manley process infringed the other company's patents is discussed later. (*Infra*, pp. 33–36.)

AGREEMENT NO. 55

The business of Gasoline Products is confined to granting licenses to manufacture gasoline by cracking under a process developed by the Drs. Cross, known as the Cross process, together with the development, designing, and supervisory work incidental to such licensing. (R. 834, 845–846.) The process is described by the Master. (R. 497–500.) A syndicate of prominent New York and Chicago bankers or their representatives, originally organized in 1916, controls the company. (R. 833, 847–848.) In the fall of 1921, when the syndicate employed G. M. P. Murphy & Company to exploit the Cross process, the only assets of Gasoline Products were its patents and patent applications and one licensing contract issued at a low royalty rate. (R. 833–834, 853.)

In 1922, however, the situation changed. In that year Gasoline Products licensed twelve additional companies to use its cracking process although Texas and Indiana together issued in 1922 only four licenses to new licensees. (R. 16–18.) Gasoline Products was thus not only outstripping Indiana and Texas in obtaining new licensees, but eventual development of a company which was charging a royalty only about one-third of that called for by the Indiana and Texas licensing agreements was a threat to their royalty income from their present licensees which in 1922 was more than $4,250,000. (R. 787.) The maximum royalty in the Gasoline Products licenses was 6¢ per 42-gallon barrel of charging stock (R. 1591–1592), the *licensee* in some cases having the option to pay about .5¢ per gallon of finished gasoline. With one exception[6] the royalty in the Indiana and Texas licenses was .4¢ per gallon of charging stock, equivalent to 16.8¢ per 42-gallon barrel of charging stock, or 25% of the net profits arising from the sale of gasoline or other products manufactured from crude oil charged into the licensee's pressure stills.[7] Indiana's experience up to 1921 had shown that the royalty of .4¢ per gallon of charging stock would yield about the same

[6] New Jersey and one of its subsidiaries also temporarily were charged different royalties. (R. 1345–1347, 1402–1404.)

[7] We submit that the description in defendants' brief (p. 9) of this royalty as "based upon the net profits from the use of the inventions" is inaccurate. (See R. 1226, 1231–1233.)

income as the royalty of 25% of net profit. (R. 1022.)

There was no patent conflict between Indiana and Gasoline Products or between Texas and Gasoline Products. In the answers to the Government's interrogatories neither Indiana nor Texas claimed to use or to be threatened by any Gasoline Products patents and Gasoline Products did not claim to use or to be threatened by any Indiana or Texas patents. (*Infra*, pp. 83–84.) There was no testimony that either Indiana or Texas charged Gasoline Products with infringement or that the latter charged either of these companies with infringement. The patent attorney of Texas was of the opinion that the Cross process infringed Texas patents and he testified that Texas was faced "with the possibility of interference and conflict in the Patent Office" with Gasoline Products, but it appears that when Dr. Cross of Gasoline Products conferred with the president of Texas their discussion turned, not on patent conflicts between them, but on the question of making "common defense" against New Jersey. (R. 913–914, 923–924.) The Master in his report said that the Cross process "may be regarded as a development from the tube cracking art rather than from the bulk distillation art." (R. 497.)

Agreement No. 55 between Texas and Gasoline Products was made January 26, 1923. (R. 1579.) Patent rights are defined as in Agreement No. 31 to include all United States patents relating to crack-

ing gasoline acquired by either party prior to January 1, 1937. (R. 1580.) Gasoline Products obtained the right to license the Cross process under Texas patent rights and Texas agreed to negotiate with Indiana and New Jersey to obtain for Gasoline Products the right to license the Cross process under similar Indiana and New Jersey patent rights. (R. 1581–1583.) Gasoline Products agreed to pay Texas not less than 30% of the royalties thereafter received from existing licensees of Gasoline Products and, when authorized to license under either Indiana or New Jersey patent rights, not less than 40% of such royalties. (R. 1586.) Of the royalties received from future licensees of Gasoline Products, it agreed to pay Texas not less than 30% and, when authorized to license under either Indiana or New Jersey patent rights, not less than 40% of such royalties and, when authorized to license under both Indiana and New Jersey patent rights, not less than 50% of such royalties. (R. 1586.) When authorized to license under the patent rights of Texas, Indiana, and New Jersey, Gasoline Products was to pay Texas a minimum of 4.5¢ per barrel of charging stock run by its future licensees. (R. 1582, 1584–1585.) Each agreed not to sue the other's licensees for past infringement and the agreement of Gasoline Products included the licensees of Indiana then or thereafter licensed under Texas patents. (R. 1581–1582.) Texas agreed to pay half the expenses of Gasoline

Products incurred in patent office interferences and in defending litigation against any licensee of Gasoline Products licensed under Texas patent rights and, if these expenses in any one year exceeded $60,000, Texas agreed to pay the entire excess. (R. 1588.)

On March 26, 1923, Texas notified Gasoline Products that it had obtained for Gasoline Products the right to license under the patent rights of Indiana. (R. 1592–1593.)

The agreement obviously did not permit Gasoline Products to make new licenses at its previous royalty rate of 6¢ per barrel of charging stock; in fact, Gasoline Products immediately increased its royalty to 10¢ per barrel. Of the 13 new licenses which Gasoline Products issued in 1923, one (Exhibit 62) was a license for foreign patents to which Agreement No. 55 did not apply; in one, subsequently cancelled (R. 846), the royalty was 6¢ (R. 1603), in one it was 9¢ (R. 1628); and in the remaining 10 licenses it was 10¢ (R. 1596, 1608, 1620, 1647, 1678, 1685, 1695, 1716, 1723, 1731).

As a result of this agreement the royalty in Gasoline Products licenses became 60% of the royalty rate of about 16.8¢ per barrel, which substantially all of the licensees of Indiana and Texas were paying (*supra*, p. 21), instead of being only 36% of such royalty. Since the licensee of a cracking process has a large investment in plant and apparatus especially designed for a particular process (joint brief for 22 secondary defendants, pp. 18, 22), the

agreement made it less likely that the existing licensees of Indiana and Texas would take out licenses from Gasoline Products and scrap the equipment installed to operate under the Burton or Holmes-Manley process. Texas and Indiana also obtained by the agreement 40% to 50% of the royalty receipts of Gasoline Products.

Agreement No. 55, by causing Gasoline Products to increase its royalty 66⅔%, not only served to protect the royalty income of Indiana and Texas but it also served to protect their own production of cracked gasoline against the competition of cracked gasoline produced at a low royalty rate. Since the yield of cracked gasoline from charging stock was under their processes about 30% (*infra*, pp. 77, 79), the royalty of 4¢ per gallon of charging stock paid by their licensees amounted to about 1.33¢ per gallon of finished gasoline. Indiana, Texas, and Indiana's subsidiary, Mid-West Refining Company, produced in 1922 over 550,000,000 gallons of cracked gasoline. (R. 768, 774, 1026.) The differential in cracking cost of 1.33¢ per gallon, applied to their entire 1922 production, would be over $7,300,000. It seems difficult to believe that preservation of this competitive advantage was not an inducing cause to the making of Agreement No. 55.

An agreement between Texas and the stockholders of Gasoline Products executed simultaneously with Agreement No. 55 appears to explain

in large part the willingness of Gasoline Products to make the latter agreement. By this side agreement the stockholders of Gasoline Products gave Texas a nine months' option to purchase 1,500 shares of the capital stock of Gasoline Products, out of a total of 2,843⅓ shares, for $2,000,000, and Texas made a down payment of $500,000 which was to be credited against the $2,000,000 if Texas exercised its option and was to be retained by the stockholders if Texas did not exercise its option. (R. 846–848.) Texas was therefore either to pay the Gasoline Products stockholders $500,000 or was to purchase a majority of their shares at $1,333.33 a share although the company up to that time had collected total royalties of only $26,151.01 (R. 795) and had borrowed from the stockholders' syndicate over $100,000 (R. 834, 864). The option, which did not expire until after New Jersey came into the combination, was not exercised. (R. 849.)

There was also a second agreement simultaneously executed between Texas and Gasoline Products. (R. 849.) Texas agreed that within sixty days it would either empower Gasoline Products to license under Indiana or New Jersey patent rights or pay Gasoline Products $250,000. (R. 850.) Gasoline Products agreed to pay Texas 50% of the net amount realized from its licensing business until $500,000, with interest, had been paid or, if Texas had paid Gasoline Products $250,000, 75% until $750,000, with interest, had been paid, such net amount to be determined by first deducting roy-

alties paid to Texas and expenses of licensing and patent protection. (R. 850–851.)

New Jersey in July, 1922, started an infringement suit against a licensee of Gasoline Products (R. 839), but there is no evidence that Agreement No. 55 was necessary to adjust this patent conflict. The evidence suggests the contrary since Texas pressed forward its negotiations with Gasoline Products with the utmost dispatch to head off a prior settlement between Gasoline Products and New Jersey. (R. 925.) If Gasoline Products made Agreement No. 55 in order to obtain freedom under New Jersey patents, it is at least curious that Texas was to receive 30% to 40% of the royalty income of Gasoline Products whether or not the latter obtained the right to license under New Jersey patents.

Although Gasoline Products may have obtained advantages from the free use of Indiana and Texas patents, present and future, it is certainly novel to assert that self interest justifies competitors in pooling their resources and profits. And the Government takes exception to the statement in the defendants' brief (p. 25) that "the increase in profit per barrel under the improved operation, made possible through the settlements, was more than seven times the increase in royalty rate," i. e., more than 28¢ per barrel. This statement is supposed to be supported (defendants' brief, p. 24) by certain testimony and exhibits. (R. 808–811.) It was there shown that the estimated profit per barrel of charg-

ing stock of one of Gasoline Products' licensees was 24.4¢ for the last six months of 1924 and in 1925, when the licensee put into operation an improved type of Cross cracking units, the estimated profit was 51.4¢ per barrel. These estimated profits depend upon two factors, i. e., prices realized for the product and cost of production. The higher estimated refinery prices in 1925 render totally untenable defendants' inference that the difference in profit was due to the improved type of Cross unit. The per barrel cost of operation in 1925 was, in fact, about 15¢ a barrel *higher* than for the 1924 period and the yield of gasoline in 1925 was less than three-fourths of 1% higher than for the 1924 period. (R. 809–811.)

AGREEMENT NO. 74

While New Jersey was operating as a licensee of the Burton process it engaged in experimental work for the cracking of gasoline by other methods. (R. 959–961.) Out of these experiments developed what is known as the tube and tank process. The process is described by the Master. (R. 490–492.) By October, 1921, New Jersey felt that the commercial success of its process was assured. (R. 967.) It first licensed use of the process in January, 1922, and granted three additional licenses prior to September 28, 1923. (Exhibits 36, 49, 64, 65.) In the first three licenses the royalty was 10¢ per 42-gallon barrel of charging stock; the fourth license provided for a paid up royalty. The royal-

ties received by New Jersey increased from $1,462.60 in 1922 to $197,718.87 in 1924 and its own production of gasoline by the tube and tank process increased from less than 1,000,000 gallons in 1921 to over 18,000,000 gallons in 1924. (R. 779, 799.)

In 1920 New Jersey took an option on an agreement by which an inventor, Adams, had conveyed to one Rogers a 40% interest in the results of certain work being conducted by Adams. (R. 973.) New Jersey brought suit on the agreement in the name of Rogers against Adams and Texas and the court held that Texas, which had acquired the patents of Adams, was charged with knowledge of Rogers' interest and therefore liable to him. (R. 909, 973.) The decree entered July, 1922, adjudged that Rogers had a 40% interest in certain Adams patents and that Texas should account to him for 40% of all moneys derived therefrom. (R. 901–908.) The entry of this decree did not involve Indiana or Gasoline Products and did not create any issue of infringement between Texas and New Jersey.

Agreement No. 74 between Indiana, Texas, and New Jersey was made September 28, 1923. (R. 1749.) Patent rights are defined, as in Agreements 31 and 55, to include all United States cracking patents acquired prior to January 1, 1937. (R. 1751–1752.) Under the agreement New Jersey and its licensees could use Texas and Indiana patent rights for the tube and tank process and Texas and Indiana and their licensees could use New Jersey

patent rights for the Burton and Holmes-Manley processes. (R. 1752–1753.) New Jersey agreed to pay Indiana not less than one-half of all moneys thereafter paid New Jersey by its present and future licensees of the tube and tank process, and in the case of such future licensees licensed "under any or all of the patent rights of Texas and/or Indiana" a minimum of 5¢ per barrel of charging stock,[8] and by virtue of Agreement 31 Texas shared in these payments to Indiana. (R. 1574–1575.) The minimum payment, 5¢ per barrel of charging stock, could be reduced proportionately if Indiana or Texas later established a royalty rate less than 16.8¢ per barrel of charging stock or 25% of net profit. (R. 1755.) Texas agreed to pay New Jersey one-fourth of all royalties thereafter paid to Indiana by New Jersey and New Jersey's subsidiary, Standard Oil Company of Louisiana, for operations under the Burton process.[9] This return of royalties by Texas seems to have been the consideration given by it for the provision in the agreement that New Jersey would surrender to Texas the Rogers interest in the Adams patents. (R. 1754.) The consideration was substantial. On the basis of 1922 royalties of over $700,000 paid to Indiana by New

[8] The description of this minimum payment in defendants' brief (p. 125) is not precisely accurate. (R. 1754.)

[9] Defendants did not explain why Indiana did not, with the consent of Texas, release outright one-fourth of the royalties, instead of having this one-fourth first paid to Indiana, then paid by it to Texas pursuant to Agreement 31, and finally returned by Texas to New Jersey.

Jersey and Standard Oil of Louisiana (R. 787), it would be over $175,000 annually.

The agreement further provided that the temporary royalty rates which Indiana gave New Jersey and Standard Oil of Louisiana by Agreements 33 and 39 should be extended to December 1, 1931, and that these two companies should thereafter be licensed to practice the Burton process under Indiana and Texas patents, royalty free. (R. 1752–1753.) Each party released each of the others and their respective licensees from all claims for past infringement. (R. 1753.)

By the agreement Texas undertook to deliver forthwith to New Jersey a grant from Gasoline Products authorizing New Jersey and its licensees to use the United States and foreign cracking patents of Gasoline Products for the tube and tank process and New Jersey agreed to deliver forthwith a grant authorizing the licensees of Gasoline Products to use New Jersey's United States and foreign cracking patents for the Cross process. (R. 1753, 1756–1760.) These grants appear in the record as Exhibits 75 and 76. (R. 1772, 1774.)

Agreement 74 went far beyond mere cross licensing. In return for reductions in payments required of New Jersey as a licensee of the Burton process, Indiana and Texas obtained the right to receive one-half of the future royalty income of a potentially powerful licensing competitor. No license issued by New Jersey after Agreement

74 was made appears in the record and the effect of that agreement on the royalty charged its licensees can only be surmised. But, payment to Indiana of one-half of the future royalties received by New Jersey from its licensees of its Tube and Tank process would at least have the effect of maintaining New Jersey's previous royalty rate, if it did not, as in the case of Gasoline Products following Agreement 55, bring about a substantially increased royalty charge to future licensees. Moreover, Agreement 74 discloses that the parties to the agreement directly linked New Jersey's royalty rate with the rate of royalty paid by Indiana and Texas licensees; the agreement provides (R. 1755) that the minimum payment to Indiana of 5¢ per barrel of charging stock may be decreased in proportion to any future reduction in the then current royalty rate paid by Indiana and Texas licensees.

As a part of the four-party arrangement consummated by Agreement 74, Indiana, Texas, Gasoline Products, and New Jersey completed the cross-licensing of each other under their United States and foreign cracking patents. By agreement No. 73 Indiana, Texas, and New Jersey each licensed the two others and empowered the two others to license their licensees under the licensor's foreign patents, excepting that no license was granted for the licensor's process. (R. 1737–1740.) Agreements 77, 78, and 79 (1777, 1792, 1794) cross-licensed the foreign cracking patents of Indiana and Texas, on

the one hand, and Gasoline Products, on the other, and by Agreement 77 Gasoline Products undertook to pay Texas 20% of all net royalties which it thereafter received from licensees for use of the Cross process under its foreign patents (R. 1780).

THE MASTER'S REPORT AND THE DISTRICT COURT'S OPINION AND DECREE

The Master's report (R. 424) filed in December, 1927, occupies 240 pages of the record. Thirteen pages (R. 424–437) are introductory; 175 pages (R. 437–612) deal with patent questions, including a description of the cracking process of each primary defendant; 32 pages (R. 613–644) consider the charges against Adams and the W. M. Kellogg Company; 19 pages (R. 645–663) are devoted to the history, scope, purpose, and effect of the 79 licensing or cross-licensing agreements listed in the petition; and only 8 of these pages (R. 652–660), or 3.3% of the report, relate to Agreements 31, 55, and 74.

The Master found that the defendants had not monopolized or attempted to monopolize, and had not conspired to restrain, interstate or foreign commerce and concluded that the petition and supplemental petition should be dismissed. (R. 663–664.)

Apparently in order to demonstrate the necessity of cross-licensing to avoid infringement of each other's patents, defendants' brief (pp. 37–38) has gathered together isolated excerpts from the Master's discussion of patents. But the Master

explicitly declared that he made no finding on the question of whether the different cracking processes infringed the patents of other primary defendants and that, in examining the patents, he did not consider their scope, but simply utility. Under the heading, "Object of Examining the Nature of the Patents," the Master said that the Government could not in this proceeding contest the scope or limitations of issued patents. (R. 447.) He further said (R. 448–449):

> The Special Master is therefore of the opinion that the *only purpose for which*, and the extent to which, *he can examine into the nature of the patents* and the scope of the several claims thereof, *is to ascertain whether they relate to inventions of utility* in the production of motor fuel which are employed by defendants and others in the industry (or are reasonably desirable and likely to be so employed), and have any reasonable relation to the contracts and agreements between the defendants, and whether the contracts, agreements and relationship between the defendants, include provisions or agreements not justified by the patent grants but wholly independently thereof restrain interstate commerce and tend to create a monopoly. (Italics ours.)

After stating the patent issues as he conceived them, the Master concluded (R. 449):

> It is for the purpose of resolving these issues, and *in no respect to* impeach their va-

> lidity or limit their scope, or *adjudicate questions of past or present infringement as between any of the defendants,* that the Special Master now examines the patents and the prior art. (Italics ours.)

At the end of his review of the various patents and cracking processes, the Master said (R. 611):

> whether and in which instances a patent or patents of one primary Defendant was infringed by either or any of the other primary Defendants in the absence of a license it is not now necessary to decide.

We submit that, with two possible exceptions, the excerpts from the Master quoted by the defendants are of little importance. The two possible exceptions are: (1) Texas in its Holmes-Manley process "uses * * * some Burton claims." (R. 465.) (2) The Holmes-Manley cracking still "embodies in its structure and operation, the inventions of a number of the patents of the defendants" and embodies

> some of the claims of Clark, Humphreys, Burton (1,160,689), Lewis & Cooke, Burton & Clark (owned by the Standard of Indiana), and some of the claims of Ellis (owned by the New Jersey Company). (R. 610.)

The foregoing general statements are not equivalent to saying that the Holmes-Manley process *could not be operated* without infringing Indiana and New Jersey patents. And the Master said that he was not even deciding whether this or any other

of defendants' processes was, *as operated,* infringing the patents of other primary defendants, in the absence of a license. Furthermore, the Master made these statements without considering the limitations of the patent claims in the light of the prior art. He said, apparently disregarding the ruling of the court permitting the Government to introduce evidence of the prior art, that the Government could not collaterally contest "the scope or limitations of the patent grants which it has made" and that—

> so far as the Government is concerned the limitations of the claims must stand as they read, just as the metes and bounds of one of its land grants stand. (R. 447.)

The Government filed exceptions to the Master's report and a motion to recommit to the Master. (R. 664, 724.) The motion to recommit was for the purpose, among others, of having the Master report to the District Court as to each cross-licensing agreement—

> (a) Whether the several claims of the several patents of one party to the agreement were or were not infringed by the operation of the oil-cracking processes of any other party to the agreement. (R. 724.)

The opinion of the District Court, one judge dissenting, was filed June, 1929. (R. 1988, 2020.) The court said that it was satisfied that it might inquire into the prior art to ascertain the scope of

the claims of the various patents involved. It then said (R. 2000):

> Having made that study, we conclude that: (a) All of the patents cover improvements only. (b) None of them are basic or pioneer patents. (c) All claims should be construed accordingly.

The court also stated that it was not willing to disturb the Master's finding that the patents are valid. (R. 2001.)

Upon the question of whether any situation existed which necessitated cross-licensing the court said (R. 2004–2005):

> It appears, however, that the principal patents of the primary defendants which are the subject of the cross-license agreements may each be practiced without infringing the other. For example, the so-called Burton patents of the Standard Oil of Indiana are not infringed by the Holmes-Manley process of the Texas Company nor the Cross patents of the Gasoline Products Company, nor by the Tube-and-Tank Process. * * *

The court thus specifically found that the patents of the company which indisputably first developed a commercially successful cracking process were not necessary to the operation of the processes later developed by the other primary defendants. The first sentence of the above quotation and the reasoning of the decision show that the court was of the opinion that the same situation existed between each of the primary defendants.

In finding that defendants' agreements unlawfully restrain interstate commerce the court said that the owner of a patent may exclusively occupy the field covered by his patent and may contract as an incident thereto, but that he can not, merely because of such ownership, make a contract with another patent owner which has for its object or inevitable result the burdening of commerce or the lessening of competition beyond the limits conferred by the patent monopoly. (R. 2002.) It said that the various agreements listed in the petition must be read together; that they interlock; that by means thereof the primary defendants fixed the royalties payable by their respective licensees and divided these royalties among themselves; that the agreements bore no logical relation to the protection of their exclusive patent monopolies; and that since the agreements transcended such protection they came within the operation of the Sherman Act. (R. 2016.) The court illustrated its conclusion by saying that a combination between patent owners, each with a valid patent used by separate licensees, to eliminate the competition of their monopolies and thereby impose or maintain burdens created by virtue of their combination, would be illegal. (R. 2016–2017.) The court said that the primary defendants dominated the trade and that the royalties which they fixed and maintained were a substantial part of manufacturing cost and that they had, for all practical

purposes, entered into an illegal agreement to fix prices. (R. 2017, 2018.)

Other provisions of the agreements which the court found illegal were the option given Indiana to purchase under certain conditions part of the Texas production of cracked gasoline in Indiana territory and the agreement of Indiana and Texas acknowledging the validity of each other's cracking patents acquired at any time during the next fifteen and a half years. (R. 2014–2015.)

Defendant's brief (pp. 51, 55, 100) criticizes the accuracy of the opinion because the court said that the 79 contracts involved " may be referred to for convenience sake as cross-licensing and sublicensing agreements." If these contracts are considered as a group, as the court said they should be, their effect, as a matter of convenience, may be described as cross-licensing or sublicensing. By the entire group of contracts the secondary defendants were given patent protection under the patents of the primary defendants other than the licensor and thereby became, in effect, sublicensees of the other primary defendants.

The decree entered January, 1930, adjudged null and void and enjoined further executing or performing the agreements described in the petition "entered into by and between the primary defendants" and the agreements described in the petition "entered into by the primary defendants with the various secondary defendants, pursuant to and in

accordance with the said void agreements of the primary defendants." (R. 2020–2021.) Jurisdiction to enforce the decree was retained. (R. 2021.)

SUMMARY OF ARGUMENT

I. Putting aside for the moment all questions of justification predicated upon patent rights, the restraints imposed by the agreements between the primary defendants were unreasonable and affected interstate commerce.

The restraints imposed by Agreement 31 between Indiana and Texas were unreasonable, first, because by equally dividing all future income from their cracking patents, except income from Indiana's existing licensees which they divided on a percentage basis, they eliminated all competition in licensing and, secondly, because they fixed by agreement the rate of royalty which each would charge in licensing under the patents of both. Agreements between competitors to pool profits or fix prices are unreasonable restraints of trade and commerce.

The restraints imposed by Agreements 55 and 74 were likewise unreasonable. By Agreement 55 Gasoline Products agreed to pay Texas, when the four-party arrangement contemplated by the agreement was completed, at least half of its future income from licensing its cracking process and by Agreement 74 New Jersey agreed to pay Indiana at least one-half its future income from licensing

its cracking process. Under Agreement 31 the income thus received by Texas from Gasoline Products and the income thus received by Indiana from New Jersey was divided between Indiana and Texas. The royalty established by Gasoline Products prior to Agreement 55 was very much lower than the royalty maintained by Indiana and Texas, but the payments which Gasoline Products was required to make to Texas following that agreement brought about a substantial increase in its royalty rate. The division of income with Texas and certain required minimum payments to Texas fixed a certain minimum royalty which substantially restricted the competitive freedom of Gasoline Products for a period of probably more than thirty years. The effect of Agreement 74 on New Jersey was substantially the same. The division of income from licensing established by Indiana and Texas when they dominated the business was thus extended to the royalty income of Gasoline Products and New Jersey when in turn these companies developed rival cracking processes.

By Agreement 31 interstate commerce in cracked gasoline was directly restrained by provisions affecting the sale of this commodity in interstate commerce in Indiana's retail marketing territory, this restraint applying both to part of Texas' production of cracked gasoline and to part of the cracked gasoline production of all future licensees of Texas or Indiana licensed under the patents of

both companies. Interstate commerce was also affected because the agreements of the primary defendants prevented or tended to prevent the production of cracked gasoline except on the payment of high royalties, to the end that the large, royalty free, cracked gasoline production of Indiana and Texas might be sold in interstate commerce at a greater competitive advantage. An unreasonable restraint on production, coupled with intent to control the supply of a commodity entering and moving in interstate commerce, is within the prohibitions of the Sherman Act, at least where the restraint applies to an appreciable part of total production. In 1921, when Indiana and Texas cross-licensed each other, they and their licensees produced over 86% of the total United States production of cracked gasoline and in 1924, after the primary defendants had fully cross-licensed each other, they and their licensees produced over 94% of the total United States production of cracked gasoline.

II. The restraints imposed by the agreements between the primary defendants went beyond a legitimate exercise of the rights conferred by their patent monopolies. A patent owner is entitled to the rewards of his patent monopoly, but when one company having patents controlling a commercial process attempts to increase that reward by uniting its patents with the patents of another company controlling a competing commercial process, for

the purpose of maintaining noncompetitive royalty rates, the restraint of trade and commerce effected results, not from an exercise of the separate patent monopolies conferred by the patent law, but from an exercise of power attributable to the combination of the patents. Such a combination lies outside the scope of the individual monopolies authorized by the patent law. *Blount Mfg. Co.* v. *Yale & Town Mfg. Co.*, 166 Fed. 555. Patent licensing agreements which restrain interstate commerce and which transcend what is necessary to protect the use of a patent are prohibited by the Sherman Act. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, *supra*.

The Government does not contend that it was illegal for the primary defendants to grant each other mutual patent freedom; it does not contend that it was illegal for any primary defendant to obtain a license to use any patent or patents of another primary defendant which the licensee considered economically advantageous to operation of its cracking process. It does contend that the primary defendants might not legally, by means of cross-licensing agreements, eliminate competition in licensing their separate processes, divide the income received from such licensing, fix royalty rates by agreement, or agree upon provisions tending to restrict competition in licensing or tending to maintain or increase the royalty charged by another primary defendant in licensing its process.

III. The Government does not oppose modifying the decree of the District Court to render merely voidable certain agreements between primary defendants and secondary defendants which the decree declared void. It also does not oppose modifying the decree to make certain that it does not apply to any license to a secondary defendant issued by a primary defendant before the latter was party to any cross-licensing agreement.

ARGUMENT

I

THE AGREEMENTS BETWEEN THE PRIMARY DEFENDANTS, APART FROM THE QUESTION OF ALLEGED JUSTIFICATION UNDER THEIR PATENT MONOPOLIES, CONSTITUTE A COMBINATION IN UNLAWFUL RESTRAINT OF INTERSTATE COMMERCE

A patent owner who by agreement imposes restraints on interstate commerce which are not within the scope of his patent monopoly is subject to the prohibitions of the Sherman Act. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, *supra*. On the other hand, if the restraints imposed are merely a legitimate exercise of the monopoly conferred by the patent law on the owner of a patent, the Sherman Act is not violated. *United States* v. *General Electric Co.*, 272 U. S. 476. The first issue in this case, therefore, is whether, aside from alleged justification under the patent laws, the primary defendants have combined to restrain

interstate commerce. This issue involves two questions: Were the restraints unreasonable and did they restrain interstate commerce?

Agreement No. 31 between Indiana and Texas executed August 26, 1921, was the first cross-licensing contract between primary defendants. It followed the first threat of substantial competition with Indiana and its licensees of a large company having ample resources to develop an improved cracking process and an organization well equipped for aggressively selling the product. By this agreement Indiana and Texas pooled their existing patent resources, as well as future patent resources acquired at any time during the next fifteen and a half years, and agreed to share equally all income which either derived from such resources, except that special provision was made for the division of income from the existing licensees of Indiana. The agreement put an end to competition between Indiana and Texas in the development and extension of the Burton and Holmes-Manley processes and automatically resulted by reason of the pooling of royalties in a unified control over royalty rates.

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, this Court held that the organization of a holding company and the acquisition by it, in exchange for its stock, of a majority of the stock of two competing railroads was an agreement in unreasonable restraint of interstate commerce be-

cause of its necessary tendency to eliminate competition. The Court said (p. 328):

> The Circuit Court was undoubtedly right when it said—all the Judges of that Court concurring—that the combination referred to "led inevitably to the following results: * * * second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."

Agreement 31 would seem to have an even more direct tendency to eliminate competition than the situation presented in the foregoing case. By Agreement 31 the income of Indiana and Texas was directly pooled. In the *Northern Securities Co.* case earnings were not directly pooled, but a majority of the stock of the two operating railroads was held by a common stockholder.

Agreement 31 also constituted a price-fixing agreement between competitors and such a contract is an unreasonable restraint upon commerce. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. Each party could license under the patents of both, but only on terms and conditions mutually satisfactory, and for this purpose there was incorporated in the agreement a standard form of license complete in every detail, including the rate of royalty to be paid.

While the agreement to fix prices did not apply to licenses issued exclusively under the licensor's patents, this was not a material limitation on the scope of the price-fixing provisions. The royalty rate in the standard form of license incorporated in Agreement 31 was the royalty rate or substantially the royalty rate, being paid by Indiana's existing licensees. (*Supra*, p. 17.) The income therefrom, in which both parties were to share, was then over $3,500,000 annually. (*Supra*, p. 15.) Since both parties were vitally interested in maintaining this royalty rate and since neither would obtain any additional advantage by granting a license only under its own patents, the obvious purpose and the natural consequence of Agreement 31 was that all licenses should be issued under the patents of both companies and at the agreed royalty rate. All new licenses thereafter negotiated were issued under the patents of both companies and provided for royalties at the agreed rate. (Agreements 45, 46, 48, 54.)

The restraints incorporated in Agreement 31 not only fell within the class of restraints which this Court has held to be illegal; they also restrained interstate commerce. In this connection other provisions of the agreement and the situation of the contracting parties must be considered.

Since 1913 Indiana had been exploiting a process for cracking gasoline and prior to 1920 it was the only commercially successful process in general use.

The exploitation of this process had been extraordinarily profitable. First, and most obviously, Indiana had received a royalty income therefrom of over $15,000,000. (R. 789.) Secondly, and perhaps more important, Indiana had during these years been selling gasoline manufactured with the economies incident to cracking in certain States where its percentage of the business had ranged from over 80% to over 55% (*supra*, p. 13), and had made provision to exclude therefrom the competition of gasoline similarly manufactured.

Prior to August 26, 1921, Indiana had issued 28 licenses to crack gasoline, yet only 3 of the entire 28 licenses permitted manufacture in Indiana territory.[10] The provisions of the 3 licenses permitting manufacture in Indiana territory also demonstrate the purpose of Indiana to exclude cracked gasoline from its marketing territory. Agreement No. 2 licensing manufacture in Kansas authorized

[10]

Agreement No.	Territorial limitations of license to manufacture	Agreement No.	Territorial limitations of license to manufacture
1	Canada.	15	Assignment foreign patents.
2	Kansas.	16	California.
3	Lima, Ohio.	17	New Jersey.
4	Assignment foreign patents.	18	Utah.
5	N. J., Md., & W. Va.	19	Houston, Tex.
6	Texas.	20	Texas.
7	Ohio.	21	Assignment foreign patents.
8	Kansas.	22	N. Y., R. I. & Phil. Isls.
9	New Jersey.	23	Assignment foreign patents.
10	Ohio.	26	Augusta, Kans.
11	Kansas.	27	Ohio.
12	N. J., Md., & W. Va.	28	Texas.
13	Louisiana.	29	Kentucky.
14	Texas.	30	Ohio.

sale of the cracked gasoline only (1) at wholesale and (2) outside Indiana territory, except Kansas. (R. 1034.) Agreement No. 11, issued to the same licensee after Agreement No. 2 had expired, licensed manufacture in Kansas, but permitted Indiana to cancel the license if the licensee, or others with its consent, approval or knowledge, sold any of the cracked gasoline in Indiana territory, including Kansas. (R. 1114.) Agreement No. 26 licensed manufacture at a particular plant in Kansas and authorized Indiana to purchase annually during the life of the agreement one-third of the gasoline produced, with detailed provisions covering the price to be paid therefor. (R. 1270–1271, 1274–1278.)

The purpose of Indiana to keep gasoline out of its territory is further shown by the various provisions in the licenses authorizing manufacture outside Indiana territory which prohibit sale of the cracked gasoline in Indiana territory or permit Indiana to cancel the license if gasoline manufactured thereunder is so sold. (*Supra*, p. 12.)

With the situation as outlined, Texas in 1920 developed a rival cracking process. At that time it had two refineries in Indiana territory and planned to install cracking units in all of its refineries. (*Supra*, p. 15.) Although the center of Texas operations was outside Indiana territory, its Holmes-Manley process, if it had been pushed independently, would have threatened not only the roy-

alty income of Indiana but also its policy of excluding, or of being in a position to exclude, cracked gasoline from its marketing territory. When, therefore, Indiana and Texas by Agreement 31 pooled their resources and their income and agreed upon a standard form of licensing contract, when this standard form of contract gave Indiana the option to purchase annually during the life of the agreement one-third of the licensee's production of cracked gasoline either manufactured under the license in Indiana territory or manufactured outside and sold or shipped into that territory,[11] when Texas by the agreement gave Indiana a similar option (limited to cracked gasoline produced by Texas in Indiana territory in excess of 25% of Indiana's production), it is clear that the direct purpose and effect of the agreement was to control the supply of competitive cracked gasoline available for sale in Indiana territory and to restrain interstate commerce by restricting the interstate movement of cracked gasoline within and into Indiana territory.

Defendants' brief (p. 105) asserts that Indiana's waiver of the option provisions, filed in this case pursuant to an offer made on the argument before the District Court, is evidence of the fact that no ulterior motive lay behind these provisions. Such

[11] All of the new licenses thereafter issued by Indiana or Texas contained such an option (Agreements 45, 46, 48, 54) and Agreement 32 provided that Indiana could cancel the license if the licensee or others with its knowledge sold the gasoline manufactured thereunder in Indiana territory.

repentance comes too late. The restrictive agreements were intended to be effective when made. Since that time all of the primary defendants have combined their resources and their combination is one of commanding power. Belated acquiescence when judgment is about to be pronounced is no evidence of good faith. It is rather a confession of wrong in an effort to save the combination in its full completion by the abandonment of methods employed in its creation which are no longer essential to its power.

Agreement No. 37 executed February 1, 1922, shows the continuing purpose of Indiana to protect itself against the competitive sale of cracked gasoline in Indiana territory. The agreement provides for construction by Indiana of a commercial unit for testing a process developed by The Hoover Company and gives Indiana the exclusive right to issue licenses to third parties to use the process. (R. 1386.) It provides (R. 1389) that in issuing such licenses Indiana—

> shall have the right to incorporate therein, reasonable restrictions so as to *protect* the second party [Indiana] in what is known as the "Indiana Company's territory" * * *. (Italics ours).

Agreement 31 therefore directly affected interstate commerce both through the option given by Texas and through provision for inserting an option clause in future licenses granted by either party. The long continued policy of Indiana in

protecting itself against competition from cracked gasoline in its marketing territory gives significance and meaning to these option provisions. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, where certain patent licensing agreements were attacked as illegal under the Sherman Act, this Court said (pp. 92–93) that since provision was made in the agreements, not alone for the manufacture, but for the sale at stated prices of the manufactured product, interstate commerce was affected within the meaning of the Act.

We submit that Agreement 31 also restrained interstate commerce because its purpose and effect was to prevent the production of cracked gasoline by virtue of licenses issued by Texas or Indiana acting independently of each other. By this restraint on production the parties intended to restrain or control the supply of cracked gasoline in the hands of competitors of Indiana entering and moving in interstate commerce within Indiana territory. Although the mere reduction in the supply of an article to be shipped in interstate commerce by an illegal restraint on its manufacture is usually an indirect or remote obstruction to such commerce and hence not within the Sherman Act, when the intent of those unlawfully preventing the manufacture is to restrain or control the supply entering and moving in interstate commerce, their action is a direct violation of the Act. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310.

The extent of the domination of cracking by the contracting parties also indicates that the restraints imposed by their agreement affected interstate commerce directly and substantially. This Court has held that stopping the production of mines with a potential output of 5,000 tons of coal a day (or 30,000 tons a week for a six-day working week), when the national production of coal was from 10,000,000 to 15,000,000 tons a week may constitute a direct restraint of interstate commerce prohibited by the Sherman Act if coupled with an intent to restrain such commerce. *Coronado Coal Co.* v. *United Mine Workers, supra,* p. 309; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 412. In that case the restraint applied to less than three-tenths of one per cent of the national production. In the present case the scope of the potential restraint was incomparably greater. Indiana and Texas, together with their subsidiaries and licensees, produced in 1921 over 86% of the total United States production of cracked gasoline (*infra,* p. 80) and the Master said that when Agreement 31 was made their processes were "the only two commercial cracking processes in the field." (R. 652.)

Agreement 31 further restrained interstate commerce by providing for maintenance of the royalty rate paid by Indiana's existing licensees. (*Supra,* p. 17.) Maintenance of this royalty rate, in addition to safeguarding the royalty income of Indiana

and Texas, gave them a competitive advantage in marketing in interstate commerce their own cracked gasoline production. Since their own cracking operations were royalty free [12] and since the agreed-upon royalty rate amounted to about 1.33¢ per gallon of finished gasoline, Indiana and Texas enjoyed a differential over competitive cracked gasoline which would amount to more than $7,300,000 if fully realized on the sale of their 1922 production. (*Supra*, p. 25.) The purpose and necessary effect of Agreement 31 in fixing royalty rates was to maintain a noncompetitive rate of royalty on the production of cracked gasoline and to exclude from interstate commerce cracked gasoline which would have been produced under lower competitive royalty rates in the absence of agreement fixing these rates.

Agreement No. 55 between Texas and Gasoline Products, executed January 26, 1923, was the second cross-licensing agreement between primary defendants. It followed the entry of another dangerous and substantial competitor having an improved cracking process, quite different from those developed by Indiana and by Texas, prepared to

---

[12] Agreement 23 licensed Indiana under one patent of Standard Oil Company of New York and Indiana paid as royalty one-half of the royalties paid by Standard Oil Company of New York to Indiana under Agreement 22. (R. 1234.)

issue licenses at rates substantially lower than those agreed upon by Texas and Indiana. Prior to 1921 Gasoline Products had issued only one license, and this was partly experimental, but in 1922 it issued 12 additional licenses at a royalty of 6¢ per barrel of charging stock as compared with the equivalent Indiana and Texas royalty of 16.8¢ per barrel. (Supra, p. 21.) In July, 1922, New Jersey had started an infringement suit against a licensee of Gasoline Products. This suit slowed up installation of new cracking units by Gasoline Products' licensees, but Gasoline Products began negotiating with New Jersey for a settlement. (*Supra,* p. 27.) For many years the Texas executives had been on friendly terms with Dr. Cross, the inventor of the Cross process of Gasoline Products, and Texas pushed forward its negotiations with Gasoline Products to head off a prior settlement between Gasoline Products and New Jersey. (R. 924, 925.)

By Agreement 55 Texas, after Gasoline Products had been authorized to license under the patents of Indiana and New Jersey, was to receive not less than 50% of the royalties paid to Gasoline Products by its future licensees, and a minimum of 4.5¢ per barrel of charging stock, and Texas was to receive not less than 40% of the royalties paid by the existing licensees of Gasoline Products. (*Supra,* p. 23.)

Texas was to negotiate with Indiana and New Jersey to obtain for Gasoline Products authority to license under Indiana and New Jersey patents, but even if no such authority was obtained Gasoline Products was to pay Texas not less than 30% of the royalties received from its present and future licensees. The agreement made Texas practically a partner in the licensing business of Gasoline Products. When the contemplated four-party arrangement had been completed, Texas was to receive at least half the income of Gasoline Products, was to pay at least half the latter's patent expenses (*supra,* pp 23–24) and was to contribute its patent resources, present and future. When Indiana within sixty days agreed that Gasoline Products might license under Indiana patents, it likewise became practically a partner in this licensing business, receiving by virtue of Agreement 31 half of the payments which Gasoline Products was required to make to Texas and contributing its patent resources.

The agreement did not, like Agreement 31, have the effect of eliminating all competition in licensing between the contracting parties. But the payment to Texas in the case of new licensees of 4.5¢ per barrel of charging stock or 50% of royalty receipts, whichever was the greater, compelled Gasoline Products, in order to obtain any profit, to increase substantially its previous royalty of 6¢ per barrel of charging stock. The agreement fixed no time limitation on the payments to Texas, which

presumably were to continue during the life of any patents to which the agreement applied, the last of which might be issued in 1936 to expire in 1953, more than thirty years after the agreement was made. The limitation on the contractual freedom of Gasoline Products imposed by the required minimum payments might therefore continue for more than thirty years, although even within a few years conditions might change radically. Agreement 31 prevented Gasoline Products from freely determining the amount of its royalty charge. Thus, Gasoline Products could not accept a lump sum or commuted royalty from its licensees until it had first obtained the consent of Texas. (R. 854–860.)

It seems clear that the minimum payments required of Gasoline Products were intended to affect all interstate commerce in cracked gasoline. The higher the royalty of Gasoline Products, the greater the probability that the licensees of Indiana and Texas would continue to operate under their existing licenses and that the cracked gasoline manufactured and sold in interstate commerce by such licensees would continue to bear the royalty tax imposed by Indiana and Texas. The higher the royalty of Gasoline Products, the greater the advantage of Indiana and Texas in selling in interstate commerce their own royalty-free production of cracked gasoline. In 1923 they and their subsidiaries produced over 667,000,000 gallons of cracked gasoline. (R. 768, 774, 1026.) The answer of

Gasoline Products described its royalty of 10¢ per barrel of charging stock as equivalent to approximately .8¢ per gallon finished gasoline. (R. 105.) The amount of this differential in the production cost of cracked gasoline sold in interstate commerce in competition with cracked gasoline manufactured by Indiana and Texas, royalty free, would, if applied to their entire 1923 output, amount to over $5,300.000.

Maintenance of a high level of royalties on substantially all cracked gasoline produced by others than the primary defendants directly affects interstate commerce in such gasoline. A purely local act, such as buying or selling livestock on a public stockyard, which may impose unreasonable charges on products moving in interstate commerce, is within the regulatory power of Congress under the commerce clause. *Stafford* v. *Wallace,* 258 U. S. 495.

The $500,000 in cash which Texas paid to the stockholders of Gasoline Products simultaneously with the execution of Agreement 55 appears to have been the primary consideration for the making of this contract by Gasoline Products. Their stockholders were offered half a million dollars. This was immediate and certain. In return the company surrendered a half interest in its business to Texas, Indiana sharing equally in this half interest.

The final series of cross-licensing agreements between the primary defendants, Agreements 73 to 79, inclusive, center around Agreement No. 74 made on September 28, 1923, between Indiana, Texas, and New Jersey, but also providing for cross-licensing between Gasoline Products and New Jersey. By these agreements the combination between all four of the primary defendants was completed. By Agreement 74 New Jersey undertook to pay Indiana (by virtue of Agreement 31 Texas shared in these payments) one-half of all the royalties thereafter received from licensees of the tube-and-tank cracking process of New Jersey and in the case of future licensees licensed under any or all Indiana or Texas patents, a minimum of 5¢ per barrel of charging stock. This tube-and-tank process had been developed successfully by the fall of 1921 and New Jersey first licensed the process in 1922. New Jersey in turn received important reductions in the net royalties payable by it and one of its subsidiaries for cracking under the Burton process. (*Supra*, pp. 28–31.)

As in the case of Agreement 55, there was no time limitation fixed for the payments to Indiana, which presumably were to continue during the life of any patents covered by the agreement, or possibly to January 1, 1954. In broad outline, Indiana and Texas achieved by Agreement 74 the same results with respect to the licensing business of New

Jersey which they had achieved by Agreement 55 respecting the licensing business of Gasoline Products and similar restraints were imposed with like purpose and intent.

Agreements 73, 75, 76, 77, 78, and 79 completed the pooling of the primary defendants' patent resources, both United States and foreign, acquired at any time prior to January 1, 1937.

In 1924, when the patent resources of the primary defendants were completely pooled and when Indiana and Texas were sharing in the royalty receipts of all, the primary defendants and their licensees produced over 94% of the total United States production of cracked gasoline. (*Infra*, p. 80.)

II

THE RESTRAINTS IMPOSED BY THE AGREEMENTS BETWEEN THE PRIMARY DEFENDANTS WENT BEYOND ANY LEGITIMATE EXERCISE OF PATENT RIGHTS

The Government does not contend, and the District Court did not hold, that it is illegal for competitors to grant each other reciprocal, nonexclusive patent licenses. In other words, if the primary defendants had merely exchanged immunities against infringement claims without attempting by collateral agreements to suppress competition and restrain trade the Government would have no complaint.

The Government does not contend, and the District Court did not hold, that competitors may not legally receive and give appropriate consideration for the grant to each other of reciprocal, nonexclusive patent licenses. The Government does contend, and the District Court held, that two companies, having the only processes then successfully developed for manufacturing gasoline by cracking, might not legally as part of a cross-licensing patent agreement provide for the elimination of all competition between them in the licensing of their separate processes; provide for maintaining in future licenses issued by either, the rate of royalty established by the company which had previously monopolized the business of licensing a cracking process; provide for division between them, on a fixed percentage basis, of all patent income received from the licensees of the first company, to the end that the second company should not compete for such business; provide for inserting in future licenses issued by either party restrictive covenants designed to protect the first company in the sale in interstate commerce of its own cracked gasoline production substantially free from the competition of other cracked gasoline—all for a period of probably more than thirty years.

The Government does contend, and the District Court held, that when Indiana and Texas, both large producers of cracked gasoline, had thus established a partnership in the business of licensing the

cracking of gasoline and when Gasoline Products and New Jersey appeared as rival licensors of independently developed cracking processes, Indiana and Texas might not legally through cross-licensing agreements extend their partnership in the business of licensing to the licensing business of Gasoline Products and New Jersey by obtaining a half interest in the licensing income of these companies, with provision for minimum payments, which, at least in the case of Gasoline Products, immediately effected a substantial increase in its royalty rate, safeguarded the royalty receipts of Indiana and Texas from their existing licensees and maintained a high level of royalty charges on the production of cracked gasoline, thereby giving Indiana and Texas a greater competitive advantage in selling in interstate commerce their own royalty-free cracked gasoline.

If we assume that it was economically advantageous in some cases for a primary defendant to use in its process a particular patent or patents of another primary defendant, if we assume further that avoidance of litigation and mutual patent freedom was desirable, it does not follow that the restraints imposed by the agreements between the primary defendants were reasonably necessary to this end. If Indiana desired protection for its licensees against patent infringement it was not necessary to pool all future royalties as part of the bargain. If the patents of Indiana and those of Texas were each of about equal importance to the other,

as indicated by their agreements to divide equally all income therefrom except income from Indiana's existing licensees, Indiana and Texas might have freely exchanged immunities which would have given them the same mutual patent freedom attained by Agreement 31, but in that agreement there was inseparably linked with mutual patent protection the elimination of competition and restraint of trade and commerce.

The patent law gives to the owner of a patent the exclusive right to make, use, and sell his invention. He may entirely exclude others from the right or grant the right upon his own terms. But in the enjoyment of his monopoly he may not impose conditions which restrain trade and commerce which is not within the confines of his lawful monopoly. Here the patents related to processes for cracking gasoline. There was no exclusive right to make, use, and sell the product of any such process. The primary defendants proceeded independently in the development of their separate processes for cracking gasoline, and, as the District Court has found, the processes covered by the principal patents of each primary defendant could be practiced without infringing the patents owned by the other primary defendants. The art was a crowded one in which the cost of research was great but the rewards of success were even greater. The art related to the production of an unpatented product which was in great demand in

highly competitive markets. In these markets the primary defendants were outstanding competitors, either directly or indirectly through their licensees. Success depended not alone upon their discoveries and their patents but upon their ability to compete with others in the sale of their unpatented product. By their agreements they eliminated competition by pooling their royalties upon patents many of which had no relation to the exercise of their own processes. The direct and obvious effect of these agreements was to maintain royalty rates, which, with the natural development of the art and the grant of all rewards to inventors, would necessarily have declined. Competition in selling licenses was eliminated. By their combination competitive conditions in the sale of cracked gasoline were seriously affected, and trade and commerce in such gasoline was, we submit, seriously restrained, not by the mutual exchange of immunities between owners of various patents in a crowded art, but by their agreements collateral to such exchange. These agreements were perpetuated into the future, so that all should be secure against new discoveries in the art.

The vice in the combination between the primary defendants was not in the mere exchange of immunities from claims of infringement, nor in the acquisition of patents which had some relation to processes previously employed, in which large investments had been made and upon which busi-

ness legitimately developed was dependent. The vice lay, rather, in the pooling of all patents regardless of their relation to processes previously employed by the individual primary defendants, and a division of royalties between them, with the obvious and necessary effect of eliminating competition and restraining trade. The mere combination of patent owners in agreement to pool the income from their separate patents, and thus eliminate competition between them in the commercial exercise of their respective patent rights, discloses an intent to obtain through the combination of their patent resources a domination and control which has its source not in the ownership of patents but in the combination itself. When, as in this case, the patent owners who thus combine are competitors in the sale of the unpatented product of their patented processes, the intent to extend their control beyond their patent grants, becomes obvious. The patent law confers no such right to extend or increase the patent grant by obtaining through combination additional rewards resulting from the elimination of competition and restraint of trade. Such combinations, we submit, have been frequently condemned in the decisions of this Court and of the lower Federal courts.

In *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, *supra*, a company owned a patented tool for enameling iron ware more economically and with a better resulting

product than was otherwise possible. The courts had sustained this patent. Pursuant to prior agreement, the company gave an option on the patent to an individual who in turn licensed thereunder companies manufacturing 85% of the total production of enameled iron ware. The licenses fixed the price at which the various types of enameled iron ware might be sold to jobbers and provided for payment of certain royalties, 80% of which were to be later returned if the licensee had not violated its license agreement. There was also a jobber's license agreement which the licensed manufacturers required jobbers to execute. This license agreement was accepted by 90% of the jobbers and fixed resale prices. In affirming a decree enjoining further violation of the Sherman Act, this Court said (p. 48):

> The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law.

It also said (p. 49):

> The added element of the patent in the case at bar can not confer immunity from a like condemnation, for the reasons we have stated. * * * Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive

prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

The District Court expressed a similar opinion. (*United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 271.) It said (p. 190):

> A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it. It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman act or another. * * * A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from the making, selling, or using his invention, for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law.

In the *National Harrow* group of cases the lower Federal courts unanimously condemned as illegal a combination effecting restraint of trade by means of patent-license agreements. A number of manufacturers under various float spring-tooth harrow patents organized a corporation to which each assigned its patents and took back a license to manufacture the same style of harrow it had previously manufactured and to sell the same, but at prices not less than those set forth in its license, which could only be reduced by the corporation. All the

licenses issued by the corporation were upon like terms and conditions. *National Harrow Co.* v. *Quick* (C. C., Ind., 1895), 67 Fed. 130; *National Harrow Co.* v. *Hench* (C. C. E. D., Pa., 1896), 75 Fed. 667; *National Harrow Co.* v. *Hench* (C. C. A., 3rd, 1895), 83 Fed. 36; *National Harrow Co.* v. *Hench* (C. C. N. D., N. Y., 1898), 84 Fed. 226. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 84-85, 94-95, *supra*, was a suit against one of the licensees of the National Harrow Company, but there was no finding that the corporation had entered into like contracts with other manufacturers or that the defendant's licensing contracts were connected with such other contracts. This Court therefore held that the agreements were not shown to be in violation of the Sherman Act.

Blount Mfg. Co. v. *Yale & Towne Mfg. Co.* (C. C., Mass., 1909), 166 Fed. 555, *supra*, held a contract between two manufacturers of liquid door checks unlawful under the Sherman Act. The facts approximate closely those in the present case. Each party was licensed to use the patents of the other. All liquid door checks embodied patented devices or improvements. The contract provided for a division of profit, whether equally or not does not appear, after taking into account the net amount received or paid in settlements between one of the parties and a third manufacturer of liquid door checks. Prices were to be determined from time to time

by agreement between these three companies. The court, without specifying the nature of the restraint, said (p. 556) that the plan comprehended "restraint of improvements." The court said (p. 557):

> A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition, and creates a restraint of trade which results, not from the granting of letters patent, but from agreement. While the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased by the "unified tactics" as to prices.

It also said (p. 561):

> To limit the application of the Sherman act merely because profits may be made by a patentee in the course of business strategy seems to me to be unsound, for the reason that it misinterprets the language of the patent law, and perverts its spirit, and excludes from the Sherman anti-trust act a very considerable class of agreements which are quite as objectionable as agreements covering nonpatented articles.

United States v. *New Departure Mfg. Co.* (D. C. W. D., N. Y., 1913), 204 Fed. 107, and *United States* v. *Motion Picture Patents Co.* (D. C. E. D.,

Pa., 1915), 225 Fed. 800, also held that it is unlawful for patent-owning competitors to combine their patents through license agreements which restrain or monopolize interstate commerce.

The patents of the primary defendants did not block each other's processes. The District Court found that there was no basic patent. (R. 2000.) Each primary defendant developed independently a very different method of producing, through application of heat and pressure, a much greater yield of gasoline from crude oil than resulted from distillation at atmospheric pressure. That this could be done had long been known; the achievement of the primary defendants consisted in devising methods and apparatus to make such cracking commercially profitable. (R. 2640.) If a particular step or particular apparatus used in any process infringed the patent of another primary defendant and a license thereunder would contribute to the commercial success of the process, there is at least no finding in this case of the necessity of cross-licensing for even this limited purpose. The Master expressly disclaimed any intention to make any finding on the question of infringement; the District Court appears to have found to the contrary and certainly indicated a contrary opinion. (*Supra*, pp. 36-37.)

III

THE GOVERNMENT DOES NOT OPPOSE MODIFYING THE DECREE OF THE DISTRICT COURT TO RENDER MERELY VOIDABLE CERTAIN AGREEMENTS BETWEEN PRIMARY DEFENDANTS AND SECONDARY DEFENDANTS WHICH THE DECREE DECLARED VOID

The secondary defendants were not parties, directly or indirectly, to the agreements between the primary defendants. They suffered from the effect of these agreements to the extent that they accepted licenses after competition between their respective licensors and other primary defendants had previously been thereby limited and to the extent that their respective licensor's freedom to determine individually the terms upon which it would license had previously been unlawfully restrained by these agreements. To the extent that the agreements between the primary defendants thus unlawfully contributed to shaping the terms of licenses to secondary defendants, these licenses are the fruits of an unlawful combination and should be voidable for illegality at the option of the innocent licensees.

The decree of the District Court declared null and void and enjoined further performance of the agreements between primary defendants described in the petition. It further declared null and void and enjoined further performance of "the agreements entered into by the primary defendants with the various secondary defendants, pursuant to and in accordance with the said

void agreements of the primary defendants, and described particularly in the petitioner's petition." (R. 2020–2021.) The Government does not conceive that the purposes and objects of the Sherman Act require the courts to declare void these agreements between the primary and secondary defendants. The objects of the Act would seem to be fully accomplished if these agreements are simply declared voidable and the secondary defendants given the option, within a stated period from the date of the entry of a modified decree pursuant to the mandate of this Court, to affirm or disaffirm these agreements. If any such agreement is thus affirmed, the primary defendants should be enjoined from suing the licensee for damages, profits, or infringement for the use by the licensee, during the period of the license, of any patents covered by it as long as the licensee complies with the terms of its license. This, in substance, was the relief with respect to agreements between primary and secondary defendants which the Government requested in the decree which it submitted to the District Court.

If we assume that the Sherman Act, as related to the present controversy, should protect primarily the ultimate consumer of cracked gasoline, rather than the secondary defendants, against the effects of the unlawful agreements between primary defendants, that interest of the ultimate consumer would seem to be best protected if the

secondary defendants are permitted to determine in the light of their self-interest what course to pursue after having been given an opportunity to free themselves from their licenses. It is certainly conceivable, as urged in the joint brief for 22 secondary defendants (pp. 22, 39), that a large investment in apparatus and equipment necessary for operation of a particular process would place some of the secondary defendants in an unfavorable trading position in negotiating a new license agreement. This handicap might offset the advantage of having free competition between the primary defendants in licensing their separate cracking processes.

In the opinion of the Government the decree of the District Court does not apply to any license to a secondary defendant issued prior to the first cross-licensing agreement by its licensor. If this is correct, the decree does not apply to a license to a secondary defendant issued by Indiana or Texas prior to August 26, 1921, issued by Gasoline Products prior to January 26, 1923, or issued by New Jersey prior to September 28, 1923. No other interpretation of the decree seems possible in the light of the District Court's opinion. Nevertheless a great majority of the secondary defendants who have joined in the appeal entered into no agreement, described in the petition, with a primary defendant after the licensor was party to a cross-licensing agreement. The following is a list of

these secondary defendants, showing the licensor, the agreement number as listed in the petition, and the date thereof (R. 13–19):

Secondary defendant	Primary defendant	Agreement No.	Date of agreement
Beacon Oil Co.	New Jersey	36	1/30/22
Humble Oil Co.	Indiana	20	4/14/19
Indian Refining Co.	Gasoline Products	25 and 41	7/23/19 and 4/20/22
Owl Oil Co.	New Jersey	49	11/24/22
Pure Oil Co.	Gasoline Products	38	2/6/22
Roxana Petroleum Corp.	Gasoline Products	40	3/16/22
Supulpa Refining Co.	Gasoline Products	43	5/12/22
Standard Oil Co. (Kansas)	Indiana	11	2/1/17
Standard Oil Co. (Ky.)	Indiana	8	7/1/16
Standard Oil Co. (N. Y.)	Indiana	22, 23, and 24	4/30/19 and 5/21/19
Standard Oil Co. (Ohio)	Indiana	27	1/1/21
Solar Refining Co.	Indiana	30	7/1/21
Sun Oil Co.	Gasoline Products	44	8/14/22
Tide Water Oil Co.	Indiana	17	7/1/18
Utah Oil Refining Co.	Indiana	18	12/1/18
Waite Phillips Co.	Gasoline Products	53	12/19/22

In the opinion of the Government the secondary defendants, Standard Oil Company (La.) and Magnolia Petroleum Company, also fall within the above list of secondary defendants. Indiana licensed Standard Oil Company (La.) by Agreement 13, dated March 15, 1917, and by Agreement 39, dated February 9, 1922, modified the royalty payable thereunder for a period ending December 31, 1925. (R. 1402–1404.) Indiana licensed Magnolia Petroleum Company by Agreement 14, dated January 1, 1918, and by Agreement 57, dated March 2, 1923, modified the method of calculating the royalty payable thereunder. (R. 1600–1602.)

The Government does not oppose modifying the decree of the District Court to make certain that

it does not apply to any license issued to a secondary defendant by a primary defendant before the latter was a party to any cross-licensing agreement.

CONCLUSION

It is respectfully submitted that the decree below should either be affirmed or affirmed with directions to modify its terms so as to render merely voidable the agreements between primary and secondary defendants which the decree declared void.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

JANUARY, 1931.

APPENDIX

EXHIBIT A

I. PROPORTION OF TOTAL UNITED STATES PRODUCTION OF CRACKED GASOLINE FOR THE YEARS 1921 TO 1924, INCLUSIVE, PRODUCED BY PRIMARY DEFENDANTS AND THEIR SUBSIDIARIES

	1921	1922	1923	1924
Indiana (R. 768)	354,785,500	419,710,750	443,748,350	444,307,600
Midwest (R. 1026)	51,988,960	58,471,855	65,731,915	58,107,212
Texas (R. 774)	49,742,742	74,913,006	137,732,260	316,552,110
New Jersey (Ex. 563)	146,725,350	157,249,150	165,776,300	237,085,150
Louisiana (Ex. 563)	48,514,606	57,891,965	83,618,112	100,343,960
Humble (Ex. 563)	5,864,929	13,960,628	12,669,643	13,062,080
Total	651,832,146	786,997,354	929,276,586	1,169,458,112
Total U. S. (R. 882)	892,626,000	1,065,876,000	1,190,280,000	1,443,036,000
% of total U. S.	72.97%	73.75%	78.07%	81.04%

II. 1921 AND 1924 CRACKED GASOLINE PRODUCTION OF LICENSEES OF INDIANA OTHER THAN PRIMARY DEFENDANTS AND THEIR SUBSIDIARIES

1921

Licensee	Agreement number	Royalties paid (R. 787)	Charging stock (gals.)	Cracked gasoline production (gals.)
S. O. Ohio	*27	$472,935.76	118,234,190	35,470,257
Solar ref.	*30	177,021.63	44,255,430	13,276,629
Galena signal	*28	28,121.35	7,030,338	2,109,101
S. O. Kansas	11	241,746.25	60,436,563	18,130,976
S. O. Kentucky	8	95,626.77	23,906,643	7,171,993
S. O. New York	22	19,975.09	4,993,773	1,498,132
Tide Water	17	238,857.96	59,714,490	17,914,347
White Eagle	26	32,680.19	8,170,050	2,451,015
Utah Oil	18	56,119.77	14,029,943	4,208,983
Magnolia	14	234,856.80	58,716,575	17,614,973
Total		1,597,982.22	399,488,010	119,846,403

II. CRACKED GASOLINE PRODUCTION OF LICENSEES OF INDIANA, ETC.—Continued

1924

Licensee	Agreement number	Royalties paid (R. 769)	Charging stock (gals.)	Cracked gasoline production (gals.)
S. O. Ohio	*27	$563,459.36	170,867,340	51,260,202
Tidal Ref.	*45	46,198.74	11,649,535	3,494,906
Lion	*48	198,444.07	49,611,016	14,883,305
Solar Ref.	*30	204,228.70	51,057,175	15,317,153
Galena Signal	28	199,171.89	49,792,975	14,937,892
S. O. Kansas	11	22,892.06	5,715,515	1,714,655
S. O. New York	22	13,331.66	3,332,915	999,875
Tide Water	17	19,008.80	4,752,200	1,425,660
White Eagle	26	43,611.03	10,902,758	3,270,827
Utah	18	44,756.31	11,189,078	3,356,723
Total		1,475,482.62	368,870,657	110,661,198

The royalty rate in the starred agreements, representing in 1921 over 40% and in 1924 over 90% of the above royalties, was .4¢ per gallon of charging stock and in the remaining contracts the royalty was the equivalent rate of 25% of net profits. (R. 1022.) The number of gallons of charging stock has therefore been determined by dividing the royalty payments by .4¢.

Over the period 1913 to 1924, inclusive, Indiana produced 3,210,873,050 gallons of cracked gasoline from 10,483,621,950 gallons of charging stock, or at the rate of 30.63%. (R. 768.) In 1921 it produced 354,785,500 gallons of cracked gasoline from 1,237,717,700 gallons of charging stock, or at the rate of 28.51%, and in 1924 it produced 444,307,600 gallons of cracked gasoline from 1,398,641,400 gallons of charging stock, or at the rate of 31.77%. (R. 768.) The charging stock has therefore been converted into cracked gasoline at the rate of 30%.

The cracked gasoline production of Standard Oil Company of California is not included because its

royalty under Agreement No. 32 is a flat charge per still.

III. 1921 AND 1924 CRACKED GASOLINE PRODUCTION OF LICENSEES OF GASOLINE PRODUCTS

1921

Licensee	Agreement number	Royalties paid (R. 795)	Royalty rate per bbl. charging stock	Charging stock (gals.)	Cracked gasoline production (gals.)
Indian Ref.	25	$220.00	2¢	462,000	115,500

1924

Indian	*25, 41	$4,115.76	$0.02	8,643,096	2,160,774
Globe	*34	2,419.73	.06	1,693,818	423,455
Petroleum	*35	4,522.18	.06	3,165,512	791,378
Pure Oil, O	*38	40,722.12	.06	28,505,484	7,126,371
Pure Oil, Tex	*38	171,943.34	.06	120,360,324	30,090,081
Roxana	*40	21,336.98	.06	14,935,872	3,733,968
Sapulpa	*43	18,672.96	.06	13,071,072	3,267,768
Sun Oil	*44	8,852.07	.06	6,196,428	1,549,107
Clayton	*47	33,686.94	.06	23,580,858	5,895,215
Waite Phillips	*53	12,690.79	.06	8,883,546	2,220,887
Miller	56	5,525.79	.10	2,320,832	580,208
Waverly	59	21,166.80	.10	8,890,056	2,222,514
Skelly	60	30,142.00	.10	12,659,640	3,164,910
Omaha	63	5,164.72	.10	2,169,182	542,296
U. S. Oil Ref.	67	7,036.61	.10	2,955,378	738,844
American	68	15,779.18	.10	6,627,257	1,656,814
Union Oil (Exh. 535)		3,684.80	.10	1,547,616	386,904
Total		407,462.77		266,205,969	66,551,492

Since the royalty rate of Gasoline Products is on the basis of a 42-gallon barrel of charging stock, the number of gallons of charging stock has in each case been determined by dividing the royalty payments by the applicable royalty rate of 2¢, 6¢ or 10¢ and multiplying the resulting sum by 42.

The answer of Gasoline Products describes its royalty of 10¢ per barrel of charging stock as equivalent to approximately .8¢ per gallon of

finished cracked gasoline. (R. 105.) This equivalent charge for gasoline would result from conversion of charging stock into gasoline at the rate of 29.76%. The Indian Refining Company estimated its yield of cracked gasoline on its Cross stills at 31.69% for the last six months of 1924, and at 32.41% for the year 1925. (R. 809-810.) The American Refining Company in 1925 produced 149,558 barrels of gasoline at its Cross stills from 543,850 barrels of charging stock, or at the rate of 27.5%. (R. 826.) The charging stock of Gasoline Products' licensees might reasonably be converted into cracked gasoline at 30%, which would result in a 1924 production of 79,868,099 gallons, but in the absence of extensive figures as to the actual rate of conversion, and to be conservative, charging stock has been converted into gasoline at 25% in the above table.

IV. 1924 CRACKED GASOLINE PRODUCTION OF LICENSEES OF TEXAS

1924

Licensee	Agreement number	Royalties paid (R. 788)	Charging stock (gals.)	Cracked gasoline production (gals.)
White Eagle	46	395,978.77	18,493,199	4,917,966
Elliott Jones	84	41,146.77	10,286,193	3,085,859
Total		197,117.54	28,779,392	8,003,818

There were no licensees using the Holmes-Manley process in 1921.

The above licensees paid a royalty of .4¢ per gallon of charging stock. The number of gallons of charging stock has been determined by dividing the royalty payments by .4¢.

For the years 1920 to 1924, inclusive, Texas produced 620,022,900 gallons of cracked gasoline from 1,964,855,434 gallons of charging stock, or at the rate of 31.56%. (R. 774.) Charging stock has, therefore, been converted into cracked gasoline at the rate of 30%.

The production of Cities Service Corporation for 1924 is not included because its license is not in the record.

V. CRACKED GASOLINE PRODUCTION OF LICENSEES OF NEW JERSEY

New Jersey did not receive any royalties in 1921.

Although New Jersey in 1924 received royalties of almost $200,000 from licensees other than the primary defendants (R. 791), one of the licenses is not in the record, and the cracked-gasoline production of two other licensees can not be calculated from the royalty payments. The estimated production of the remaining licensee was less than 350,000 gallons.

VI. PROPORTION OF TOTAL UNITED STATES PRODUCTION OF CRACKED GASOLINE FOR THE YEARS 1921 AND 1924 PRODUCED BY PRIMARY DEFENDANTS, THEIR SUBSIDIARIES AND LICENSEES

	1921	1924
	Gallons	*Gallons*
Primary defendants and subsidiaries (Table I)	651, 322, 146	1, 160, 455, 112
Ind. licensees (Table II)	119, 846, 408	110, 661, 196
Gas. prod. licensees (Table III)	115, 800	66, 551, 492
Texas licensees (Table IV)		6, 093, 816
Total	771, 284, 049	1, 344, 704, 622
Total U. S. (R. 881)	892, 626, 000	1, 442, 026, 000
% of total U. S.	[1] 86.41%	93.26%

[1] If the 1921 production of Gasoline Products is omitted, Indiana and Texas, their subsidiaries and licensees, produced 86.39% of the total United States production of cracked gasoline in 1921.

EXHIBIT B

USE OR NONUSE OF PATENTS OF PRIMARY DEFENDANTS IN THEIR SEVERAL CRACKING PROCESSES, BASED ON ANSWERS TO GOVERNMENT'S INTERROGATORIES [1]

I. PATENTS NOT USED IN PROCESS OF ANY PRIMARY DEFENDANT

INDIANA PATENTS

	Interrogatory	Patentee	Patent No.
1	1	Lang	934, 575
2	5	Burton	1, 112, 113
3	10	Humphreys & Burton	1, 343, 674
4	21	Palmer	1, 313, 009
5	22	Palmer	1, 360, 973

NEW JERSEY PATENTS

6	23	Wells	1, 187, 874
7	24	Wells	1, 223, 454
8	25	Wells	1, 248, 235
9	26	Ellis	1, 216, 974
10	27	Ellis	1, 249, 275
11	28	Ellis	1, 317, 868
12	29	Ellis	1, 341, 975
13	30, 70	Ellis	1, 396, 989
14	34	Clarke	1, 413, 899
15	33	Clarke	[2] 1, 410, 707

TEXAS PATENTS

16	40	Adams	1, 426, 311
17	41	Adams	1, 426, 312
18	42	Manley	1, 426, 339
19	45	Adams	1, 445, 281
20	46	Adams	1, 455, 376
21	47	Adams	1, 455, 377
22	52	Adams	1, 477, 860
23	55	Hall	1, 194, 389
24	60	Hall	1, 261, 930
25	61	Adams	1, 306, 577
26	62	Adams	1, 306, 578

GASOLINE PRODUCTS PATENTS

27	64	Cross	0 1, 238, 851

[1] Exhibits 159 and 160 (R. 4434) also summarize the use of the various licensed patents in the processes of the primary defendants, based on the answers to the Government's interrogatories. (R. 3115–3211.)

[2] Only Claim 1 of this patent was alleged to be used (Ex. 159, folio 1146, R. 4434) and Standard Oil Development Co. filed a disclaimer of this claim. (R. 4680, 5071–5072.)

II. PATENTS USED ONLY IN PROCESS OF OWNER OF PATENT

INDIANA PATENTS

	Interrogatory	Patentee	Patent No.
1	3	Burton	1,055,707
2	8	Humphreys	1,122,002
3	9	Humphreys	1,122,003
4	10	Rogers & Cooke	1,122,220
5	12	Moore	1,130,318
6	13	Clarke	1,132,163
7	15	Cash	[1] 1,230,065
8	19	Clarke	1,388,514

NEW JERSEY PATENTS

9	32	Clarke	1,405,280
10	35	Clarke et al.	1,478,102
11	68, 70	Clarke	1,413,269

TEXAS PATENTS

12	42	Manley	1,428,338
13	48	Adams	[2] 1,461,017
14	49	Manley	[2] 1,462,143
15	50	Adams	[2] 1,462,677
16	51	Adams	[2] 1,462,678
17	54	Hall	1,175,910
18	56	Hall	1,285,139
19	60	DeFlorez	1,437,045
20	70	Hall	1,230,009
21	70	Hall	1,239,106

GASOLINE PRODUCTS PATENTS

22	65	Cross	1,203,319
23	66	Cross	1,437,229

[1] The alleged use of this patent by Texas was discontinued about the middle of 1921. (R. 2180, 2185.)

[2] The continuous process used by the Indiana Company was the Holmes-Manley process. (R. 2135, 2209.) These Texas patents used in Indiana's continuous process and designated "Cont." in Exhibit 159 (fol. 1148, R. 4494) are therefore included in this table.

III. PATENTS WHICH PRIMARY DEFENDANTS ALLEGED MIGHT BE REGARDED AS THREATENING PROCESS OR PROCESSES OTHER THAN THAT OF OWNER OF PATENT[1]

	Interrogatory	Patentee	Patent No.	Possible user other than in process of owner			
				Texas	Indiana	N. J.	Gas. Pro.
		Indiana patents					
1	2	Burton	1049667	x			
2	4	Burton	1105961	x			
3	11	Clarke	1129034			x	
4	20	Palmer	1187380			x	
		Texas patents					
5	37	Adams	1320726			x	
6	38	Adams	1320727		x	x	
7	53	Hall	1178009			x	
8	56	Hall	1242795		x	x	
9	57	Hall	1242796			x	
		Gasoline Products patents					
10	65	Cross	1423500			x	
				2	2	8	0

[1] Such alleged threat is designated by "x."

IV. PATENTS ALLEGED TO BE USED IN PROCESS OR PROCESSES OTHER THAN THAT OF OWNER OF PATENT[1]

	Interrogatory	Patentee	Patent No.	Alleged user other than in process of owner			
				Texas	Ind.	N. J.	Gas. Pro.
		Indiana patents					
1	6	Clark	1119496	U	—	—	—
2	7	Humphreys	1119760	U	—	—	—
3	14	Burton	1160089	U	—	—	—
4	17	Lewis & Cooke	1392584	U	—	x	—
5	18	Burton & Clarke	1448254	U	—	x	—
6	76–78	Burton	1167884	U	—	—	—
		New Jersey patents					
7	31	Ellis	1415232	U	—	—	U
8	70	Ellis	1318060	U	x	—	—
9	71–75	Ellis	1318061	U	U	—	—
		Texas patents					
10	36	Adams	1320354	—	U	x	—
11	39	Adams	1327263	—	U	x	—
12	44	Adams	1433519	—	U	x	—
				9	4	0	1

[1] Such alleged user is designated by "U." An alleged threat is designated by "x." The column totals relate only to alleged user.

U. S. GOVERNMENT PRINTING OFFICE: 1931

